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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 53

GANGE LUMBER COMPANY, *Appellant,*

vs.

RALPH ROWLEY and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *Appellees.*

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLANT

JOHN AMBLER,
T. J. HANIFY,
L. B. DONLEY,
WALTER KANE SCOTT,
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APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLANT

This is an appeal from a judgment of the Supreme Court of the State of Washington, entered on February 19, 1945, affirming a judgment of the Superior Court of the State of Washington which in turn affirmed a decision of the Appellee Department of Labor and Industries of the State of Washington.

I.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington, upon which was entered the judgment from which this appeal is taken, is reported in 21 Wn. (2d) 420, 151 P.(2d) 440. The opinion of the same court, which was rendered in this case upon the first appeal in the cause to said court, and in which the

grounds of the court's ultimate decision are more fully set forth, is reported in 112 Wash. Dec. (No. 8) 234, 155 P.(2d) 802.

II.

JURISDICTION

The jurisdiction of this court is invoked under Section 237a of the United States Judicial Code, as amended by Acts of February 13, 1925, January 31, 1928 and April 26, 1928 (Title 26 U.S.C.A., Sections 344a, 861a and 861b). The judgment from which this appeal is taken is a final one in the highest court of the State of Washington. The judgment drew in question the validity of a statute of said state on the ground of its being repugnant to the Constitution of the United States, the decision being in favor of the validity of the statute.

The petition for appeal was presented on February 28, 1945. This court noted probable jurisdiction on May 28, 1945.

The specific grounds upon which the jurisdiction of this court is invoked are given in appellant's Statement as to Jurisdiction previously filed herein pursuant to Rule 12 of the Rules of this court. Reference is hereby made to said document for a more complete statement as to the court's jurisdiction.

III.

STATEMENT OF THE CASE

The facts are undisputed. The appellee Ralph Rowley suffered an injury to his right hand on July 13, 1937, while engaged in extra-hazardous employment as a resawyer in the sawmill of appellant Gange Lumber Company, a Washington corporation, in Tacoma, Washington. On account of this injury, the appellee Rowley filed a report of accident and claim for compensation with the appellee Department of Labor and Industries of the State of Washington under the Industrial Insurance Law, or Workmen's Compensation Act, of said State (R. 2). The claim was allowed and lump sum awards totalling $307.50 were paid to Rowley on account of the permanent partial disability suffered by him, the claim being finally adjudicated and closed by order of the appellee Department of Labor and Industries dated March 9, 1938, from which no appeal was taken (R. 3, 4).

The law of the State of Washington in effect at the time of the appellee Rowley's injury, and at all times thereafter until December 3, 1942, provided that a workman whose disability should become aggravated after his claim was closed might apply to the appellee Department, at any time within three years after closure but not thereafter, for reopening of the claim and for additional compensation on account of the aggravation of disability. The applicable statute, codified as Remington's Revised Statutes of Washington, 1932, Section 7679(h), read as follows:

"(h) If aggravation, diminution, or termination of disability takes place or be discovered

after the rate of compensation shall have been established or compensation terminated, in any case the director of labor and industries, through and by means of the division of industrial insurance, may, upon application of the beneficiary, made within three years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminte the payment: Provided, Any such applicant whose compensation has heretofore been established or terminated shall have three years from the taking effect of this act within which to apply for such readjustment." (Laws of Washington, 1911, Chapter 74, Section 4, as amended by Laws of Washington, 1927, Chapter 310, Section 4, and Laws of Washington, 1929, Chapter 132, Section 2)

Section 7679 of Remington's Revised Statutes sets forth the "Compensation Schedule" pursuant to which lump sum awards are allowed by the Appellee Department to injured workmen on account of permanent partial disabilities suffered by them, as well as monthly compensation to workmen totally and permanently, or totally but temporarily disabled, and to the widows and surviving dependents of deceased workmen, subsection (h) quoted above being a part of the compensation section of the Act.

In 1941, the legislature of the State of Washington enacted a statute, amending Section 7679, for the purpose of increasing generally the wide variety of benefits allowable under the Workmen's Compensa-

tion Act (Laws of Washington, 1941, Chapter 209, Section 1; Remington's Revised Statutes of Washington, 1941 Permanent Supplement, Section 7679). By this Act, subsection (h) quoted above was amended to read as follows, the only changes being indicated by the italicized words:

> "(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the Director of Labor and Industries, through and by means of the Division of Industrial Insurance, may, upon the application of the beneficiary, made within *five* years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminated the payment: Provided, Any such applicant whose compensation has heretofore been established or terminated shall have *five* (*5*) years from the taking effect of this act within which to apply for such readjustment."

The 1941 Act, as enacted by the legislature, was subjected, however, to the referendum procedure provided for by the Constitution and statutes of the State of Washington and did not become effective until December 3, 1942, following approval of the act by the voters of the state at the general election held on November 3, 1942, and the proclamation of the governor of the state to that effect (Constitution of the State of Washington, Amendment 7; Remington's Revised Statutes of Washington, Section 5341; and

see *Wynand v. Department of Labor and Industries*, 21 Wn.(2d) 805, 153 P.(2d) 302).

At no time within three years after closure of his claim did the appellee Rowley apply for reopening and additional compensation, and his right so to apply became forever barred. This, of course, was recognized not only by the decision below, but had been repeatedly so held, under similar circumstances, by the Supreme Court of Washington:

Schmeiling v. Department of Labor and Industries, 167 Wash. 692, 10 P.(2d) 229;

Ferguson v. Department of Labor and Industries, 168 Wash. 677, 13 P.(2d) 39;

Cox v. Department of Labor and Industries, 177 Wash. 529, 32 P.(2d) 570;

Botica v. Department of Labor and Industries, 184 Wash. 573, 52 P.(2d) 332;

Hunter v. Department of Labor and Industries, 190 Wash. 380, 68 P.(2d) 224.

After the 1941 Act became effective, and on March 19, 1943, more than five years after the claim was closed, the appellee Rowley filed his application for reopening of his claim and for additional compensation on the ground of an alleged aggravation of his disability occurring after March 9, 1938, the date of final closing of his claim (R. 5). This application was rejected by the appellee Department of Labor and Industries through the Supervisor of Industrial Insurance, on the ground that the appellee Rowley's right so to apply had become barred under the law *in effect at the time of his injury* and at the time of

the closing of his claim (R. 7). This rejection was affirmed upon appeal by the Joint Board of the appellee Department (R. 9) and by the Superior Court of the State of Washington for Pierce County (R. 13), but was reversed by the Supreme Court of the State of Washington. The latter court held, 21 Wn.(2d) 420, 151 P.(2d) 440, that the 1941 Act was to be interpreted as applying retroactively to permit the reopening of the appellee Rowley's claim and an award of additional compensation to him *notwithstanding* that his right to apply therefor *had become barred* under the earlier law, prior to the effective date of the *new* law, and the court held further that the 1941 Act, as so interpreted, did not violate the 14th Amendment to the Constitution of the United States in its application to the appellee Gange Lumber Company.

Pursuant to a Judgment of the Supreme Court of the State of Washington (R. 20), the cause was remanded to the appellee Department (R. 21) where an investigation of the appellee Rowley's disability was had (R. 24) and pursuant thereto additional compensation in the amount of $460.50 was ordered paid to Rowley on account of the aggravation of disability which he claimed (R. 27), this order being affirmed upon appeal by the Superior Court for Pierce County and the Supreme Court of the State of Washington (R. 38, 44). The amount of the additional award is chargeable to the appellant Gange Lumber Company's cost experience under the Industrial Insurance Law and the award will be paid in large measure by the appellant:

Remington's Revised Statutes of Washington, Supp., Section 7676, page 251;

Majority and dissenting opinions below, 21 Wn.(2d) 420, at pp. 428 and 446, 151 P. (2d) 440, at pp. 444 and 453;

Mud Bay Logging Co. v. Department of Labor and Industries, 189 Wash. 285, 6 P.(2d) 1054, 193 Wash. 275, 75 P.(2d) 579;

Cole v. Department of Labor and Industries (dissenting opinion), 200 Wash. 296, 93 P. (2d) 413;

Schaefer Bros. Logging Co. v. Department of Labor and Industries, 4 Wn.(2d) 720, 104 P.(2d) 747.

IV.

INDUSTRIAL INSURANCE LAW GENERALLY

The Workmen's Compensation Act was originally adopted as Laws of Washington, 1911, Chapter 74, and has been the subject of amendment many times since.

Section 1 of the Act, now Remington's Revised Statutes, Section 7673, contains a declaration that the common law system governing the remedy of injured workmen against employers is inadequate, because of the inevitability of accidents in industry for which workmen had no redress against their employers. Section 1, therefore, in the exercise of the state's police and sovereign powers, ablished all common law causes of actions in favor of workmen against employers, and the Act, by Section 5 (Remington's Revised Statutes,

Section 7679) substituted for the workmen the right to compensation, "regardless of questions of fault" on his part or on the part of his employer, out of a fund to be maintained by the appellee Department.

This fund, known as the accident fund, is provided for by section 4 of the Act, now (and since Rowley's injury) Remington's Revised Statutes, Supplement, Section 7676. It is supported by contributions paid into the State Treasury by employers engaged in extrahazardous industry for the exclusive account of the accident fund.

Section 7676 divides such industry into 91 classes and sub-classes, covering a great variety of businesses, basic premium rates for employers in the various classes and sub-classes based upon the risk therein. These rates are subject to revision and change from time to time by the Director of the appellee Department, at his discretion and as he may determine the condition of the accident fund requires.

Section 7676 provides also that, in determining the actual premium rate applicable to each employer, the Department shall take into consideration "the average cost experience of each employer for each workman hour reported by him during each fiscal year in each such class or sub-class over the five-year period immediately preceding September first of the year in which the rate is being determined," and Section 7676 then provides that "The actual premium rate which any employer shall be required to pay for the accident fund shall be forty per cent (40%) of the basic rate, plus sixty per cent (60%) of the em-

ployer's cost rate for each workman hour reported by him during each fiscal year over the five-year period next preceding the then last September first, but in no case shall the total rate exceed one hundred sixty per cent (160%) of the basic rate." The legislative policy of the state is stated by Section 7676 to be that "It is the intent that the accident fund created under this section shall ultimately become neither more nor less than self-supporting, exclusive of the expense of administration" which is appropriated biannually by the legislature out of the general funds of the state (Remington's Revised Statutes of Washington, Section 7708; Laws of Washington, 1945, Chapter 8, page 27).

A second fund, the operation of which is not involved in the case at bar, is known as the medical aid fund out of which the cost of the care and treatment of injured workmen is paid. The amount of contributions to this fund is also determined in accordance with the individual employer's cost experience but such contributions are paid one-half by the employer and one-half by his workmen. Remington's Revised Statutes, Section 7713 and Supplement, Section 7676.

Section 5 of the Act contains the schedule of awards or "Compensation Schedule" (Remington's Revised Statutes of Washington, Section 7679 at time of Rowley's injury; now 1941 Permanent Supplement, Section 7679). A lump sum award in a stated amount, payable out of the accident fund, is provided for with respect to each of many specified disabilities involving

amputations of portions of the body or other stated losses, and compensation for any other permanent partial disability is payable "in the proportion which the extent (it) shall bear to" that one of the specified disabilities which it most closely resembles. Monthly awards, commonly called pensions, are provided for in the cases of permanent total disability and, for widows and dependents, in the cases of death of workmen.

Section 20 of the Act provides for the procedure in connection with the allowance, or rejection of a claim for compensation (Remington's Revised Statutes of Washington, 1943 Permanent Supplement, Section 7697). Section 7697 provides for the filing of a report of accident and claim for compensation with the appellee Department of Labor and Industries. The claim, on behalf of the Department, is first considered and allowed with an award, or is rejected by the Supervisor of Industrial Insurance, one of the Department officials. Either the claimant or his employer, if dissatisfied with the action of the Supervisor, may petition for a rehearing before Joint Board of the Department, which consists of the Director of the Department, the Supervisor of Industrial Insurance and the Supervisor of Safety of the state. If a rehearing is granted, testimony may be offered and received on behalf of the claimant, the department and the employer and, upon the conclusion of the hearing, the Joint Board is required to render its decision by an order entered in the proceeding. Either the claimant or employer, if dissatisfied with such order, may appeal therefrom to the Superior Court of the State of

Washington where the cause is triable *de novo*, but upon the record made before the Joint Board, the claimant, the department and the employer may each appear and participate as a party upon such appeal, and an appeal then lies from the judgment of the Superior Court, as in other civil cases, to the Supreme Court of the State.

V.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE RELIED UPON

1. The Supreme Court of the State of Washington, by its judgment, erred in holding that Laws of Washington, 1941, Chapter 209, Section 1, insofar as said statute revives appellee's right to apply for reopening of his industrial insurance claim, notwithstanding that said right had become *barred* and had *expired prior* to the *effecti[illegible] date of said statute*, does not deprive appellant of its property without due process of law * * * in violation of the Fourteenth Amendment to the Constitution of the United States of America, and said court erred in failing to hold that said statute does so deprive appellant of its property * * *.

2. The Supreme Court of the State of Washington by its judgment erred in holding that the removal by said Laws of Washington, 1941, Chapter 209, Section 1, of the bar of limitations to the reopening of Appellee Rowley's said claim affected *only* said appellee's *remedies* under the Workmen's Compensation Act of said State and did *not* affect the *substantial*

rights of appellant, and said court erred in failing to hold that said removal did affect appellant's substantial rights.

3. The Supreme Court of the State of Washington by its judgment erred in holding that a statute, purportedly enacted in the exercise of a state's police power, viz., Laws of Washington, 1941, Chapter 209, is not subject or subservient to the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of the State of Washington by its judgment erred in holding that the contributions or premiums exacted of an employer by the Workmen's Compensation Act of the State of Washington and paid by the employer into the accident fund maintained by the appellee Department of Labor and Industries of said State are a license or excise tax.

5. The Supreme Court of the State of Washington by its judgment erred in affirming the judgment of the Superior Court of the State of Washington for Pierce County, dismissing appellant's appeal from the order of the appellee Department of Labor and Industries of said State allowing additional compensation to the appellee Rowley under said Laws of Washington, 1941, Chapter 209.

6. The Supreme Court of the State of Washington by its judgment erred in failing to reverse said judgment of the Superior Court for Pierce County and in failing to render judgment dismissing the appellee Rowley's application for reopening of his claim and for additional compensation.

VI.

SUMMARY OF ARGUMENT

The 1941 statute constitutes a taking of appellant's property without due process of law.

When a statute, in creating a right and liability, also puts a period to the existence thereof, a retroaction extension of the period after its termination amounts to the taking of the property of one injured thereby without due process of law.

The Industrial Insurance Law is such a statute and under it, the appellant's substantial rights and liabilities, not a mere remedy of the appellee Rowley, are affected.

The challenged statute is an exercise of the police power of the State of Washington, and the exercise of such power by the legislature, far from being unfettered as said by the Supreme Court of the state, is subject to the restraints of the Fourteenth Amendment.

The Industrial Insurance Law of the State of Washington is not a taxing statute but is an industrial insurance measure under which many new rights, liabilities and immunities are created in favor of both employe and employer. The premiums paid into the Accident Fund by employers are not taxes but are a trust fund held by the appellee Department exclusively for the purposes specified in the Act.

VII.

ARGUMENT

The 1941 Statute Constitutes a Taking of Property Without Due Process of Law

1. The rights of workmen and the liability of employers under the industrial insurance law are purely statutory.

Section 1 of the Act, Remington's Revised Statutes, Section 7673, after reciting that "The common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions," provided that "all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished * * *."

The Act provided for the payment out of the accident fund of compensation to injured workmen, where such right did not exist at common law; it required contributions from employers for the support of the fund, an obligation unknown to the common law; and it created many other rights and responsibilities in a system of industrial insurance unknown to the common law. As is obvious, the Supreme Court of Washington has frequently recognized all rights and liabilities under the Act as being purely statutory:

Hillestad v. Industrial Insurance Commission, 80 Wash. 425, 141 Pac. 913;

Arthun v. City of Seattle, 137 Wash. 228, 242 Pac. 16;

Purdy & Whitfield v. Department of Labor and Industries, 12 Wn. (2d) 131, 120 P. (2d) 858.

2. "In the *William Danzer & Co.* case it was held that where a statute in creating a liability also put a period to its existence, a retroactive extension of the period after its expiration amounted to a taking of property without due process of law."

This heading is a quotation from the court's opinion in the recent case of *Chase Securities Corporation v. Donaldson*, ... U.S. ....., 89 L. ed. (No. 15) 1109, 1113, decided May 21, 1945, wherein the court approved the doctrine of *Campbell v. Holt*, 115 U.S. 620, but carefully distinguished the *Danzer* case (*William Danzer & Co. v. Gulf & S. I. R. Co.*, 268 U.S. 633).

In *Campbell v. Holt*, the adoption of the Constitution of Texas in effect repealed a general statute of limitations under which the plaintiff's right at common law to the recovery of money damages for breach of contract had become barred. The court, in applying the familiar doctrine that an ordinary statute of limitations *merely bars* the *remedy* and does not destroy the right, held that the 14th Amendment did not prohibit the restoration of the plaintiff's remedy.

In the *Danzer* case, it appeared that the statutory right of the shipper-plaintiff for recovery under the Interstate Commerce Act, on account of a misrouting of his shipment by the defendant railroad, had become barred under the limitation period prescribed by the Interstate Commerce Act for assertion of the right so created. Subsequently Congress passed the Transportation Act of 1920, section 206 (f) of which provided that the period of federal control of the railroads during the First World War should not be computed as a part of the two-year period. If the period

of control were to be excluded, the plaintiff's complaint was filed within time. It was held, however, as stated in the *Chase Securities Corporation v. Donaldson* opinion, that a retroactive revival of plaintiff's right to sue would constitute a denial of due process. In speaking of *Campbell v. Holt*, the court said:

> "That case belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only. But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability. Such, for example, are statutory causes of action for death by wrongful act (authority cited), and those arising under the Federal Employers' Liability Act (cases noted). This case belongs to the latter class. * * *"

In *The Harrisburg*, 119 U.S. 199, 214, the court said:

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year; and it would seem clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent

parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. *The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right.*" (Emphasis supplied.)

In *Central Vermont Railway Company v. White*, 238 U.S. 507, 511, the court said:

"There can, of course, be no doubt of the general principle that matters respecting the remedy —such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought (*M'Niel v. Holbrook*, 12 Pet. 89). *But matters of substance and procedure must not be confounded because they happen to have the same name.* For example, the time within which a suit is to be brought is treated as pertaining to the remedy. But this is not so if, by the statute giving the cause of action, the lapse of time not only bars the remedy, but destroys the liability. (Cases cited.) In that class of cases the law of the jurisdiction, creating the cause of action and fixing the time within which it must be asserted, would control even where the suit was brought in the courts of a state which gave a longer period within which to sue. * * *" (Emphasis supplied.)

In *Kannellos v. Great Northern Railway Co.*, 151 Minn. 157, 186 N.W. 389, 390, citing *Negaubauer v. Great Northern Railway Company*, 92 Minn. 184, 99 N.W. 620, with approval, the court said:

"The rule controlling the question—the rule followed and applied by the courts generally—is

as stated in the (*Negaubauer*) case just cited, and to the effect that, where a statute gives a new right of action, not existing at common law, and prescribes the time within which it may be enforced, the time so prescribed is a condition to its enforcement, an element in the right itself, and the right falls with the failure to apply for relief within the allotted time. The rule as stated is one of general application and is distinguished from the rule applied to statutes limiting the remedy, and not the right."

See also:

Fullerton-Krueger Lumber Co. v. Northern Pacific R. Co., 266 U.S. 435;

Kansas City Southern R. Co. v. Wolf, 261 U.S. 133;

Davis v. Mills, 194 U.S. 451;

La Floridienne v. Seaboard Air Line R. Co., 59 Fla. 196, 52 So. 298;

Lewis v. Missouri Pacific R. Co., 324 Mo. 269, 23 S.W.(2d) 298;

1 Wood on Limitations (4th ed.), page 41, Section 9.

The Supreme Court of Washington has also repeatedly observed the same distinction. In *Morris v. Orcas Lime Co.*, 185 Wash. 126, 130, 53 P.(2d) 606 (certiorari denied, 299 U.S. 559), the court said:

"The statute defining and allowing recovery for a preference creates a statutory, legal liability, subject to the limitation that a suit to enforce it must be commenced within six months from the time of filing the application for the appointment of a trustee, etc. The limitation is

not one that goes to the remedy of a defendant, like the ordinary statute of limitation, but it goes to the cause of action or right to sue. The time prescribed—six months from the time of filing the application for the appointment of the trustee—for the commencement of the action is a condition to the enforcement of the liability or the trustee's right of recovery, an element in the right itself. The right falls with the failure to commence the action within the time allotted."

See also

Earle v. Froedtert Grain & Malting Co., 197 Wash. 341, 85 P.(2d) 462;

Peeples v. Hayes, 4 Wn.(2d) 253, 104 P. (2d) 305;

and *Eagles v. General Electric Co.*, 5 Wn.(2d) 20, 33, 104 P.(2d) 912, 917, where the court said:

"* * * However, * * * the so-called limitation pleaded in that case was the six months' limitation with respect to actions brought by receivers to recover unlawful preferences * * * which is not in a true sense a statute of limitations at all * * *."

The *Danzer* case was passed upon, so far as we can determine, only once by the Supreme Court of Washington prior to the case at bar. In *Herr v. Schwager*, 145 Wash. 101, 258 Pac. 1039, the *Danzer* case, although it was not mentioned by name in the opinion, had been relied upon by the appellants in their brief. They contended that the liability upon which the action had been commenced against them was a liability created by statute. The right to sue had once become barred prior to the enactment of an amendatory statute expressly extending the time for commence-

ment of their action. The court, in following *Campbell v. Holt*, said:

> "It is argued that the case of *Campbell v. Holt*, supra, is not applicable to the present case for the reason that the liability, if any, on the part of the appellants is statutory. The answer to this is that the liability of one diverting the assets of an insolvent corporation to the prejudice of the rights of a creditor exists at common law."

The distinction between *Campbell v. Holt* and the *Danzer* decision is studiously observed in the opinion in *Chase Securities Corporation v. Donaldson*. In the latter case the appellant had relied upon the *Danzer* case, contending that the suit brought against it was found upon a liability created by the statutes of Minnesota. The court approved the doctrine of *Campbell v. Holt*, notwithstanding its criticism in legal literature and by many courts. But the court said in their opinion:

> "The (Minnesota) Blue Sky Law imposes duties upon a seller of certain securities, but it does not expressly *define a liability* for their omission or *create a cause of action* in favor of a buyer of unregistered securities. The state courts, nevertheless, held that such an illegal sale will support *a common-law action in tort*." (Emphasis supplied.)

And the court said also:

> "It is not uncommon that a single cause of action in tort will rest both on omission of a statutory duty and on common-law negligence; the two bases do not necessarily multiply the causes of action. (Authority cited.) This appears to be permitted by the law of Minnesota."

And further:

> "No separate statement of *a statutory cause of* action is set out in the complaint in this case. * * * The state courts seem to have treated the complaint as setting up several bases for a single *common-law cause of action* in tort which had been remanded for trial at the time the new statute was enacted. We must regard it in the same light." (Italics ours)

Then, in expressly distinguishing the *Danzer* case, the court said:

> "At the time this action was commenced the Blue Sky Law of Minnesota had imposed on appellant a duty; *it had not explicitly created a liability.* The liability was implied *by the state's common law;* the period of limitation was found only in *the general statute of limitations* enacted many years earlier. The state court concluded that the challenged statute did not confer upon appellees *a new right* or subject appellants to *a liability.* * * *" (Emphasis ours)

a. The inapplicability of Campbell v. Holt

It is perfectly plain that the Workmen's Compensation Act of the State of Washington did create a new right in the appellee and did impose a new liability upon the appellant. The general statute of limitations of the State of Washington, applying to all manner of common law causes of action, has no application here, nor has it ever been contended to have any application. The reason for the rule in *Campbell v. Holt* has no application here. The *Danzer* case is squarely applicable, for the Industrial Insurance Law, in creating the right of Rowley and the accompanying

liability of the appellant, put a limitation upon the existence of both thereof, and the purported retroactive extension of the period after its expiration amounts to a taking of the appellant's property without due process of law. *Link v. Receivers of Seaboard Airline Ry. Co.*, 73 F.(2d) 149, follows the *Danzer* case and is squarely in point here.

3. The state's exercise of its police power is subject to the restraints of the Fourteenth Amendment.

In avoidance of the *Danzer* case, the majority opinion of the Supreme Court of Washington in the case at bar states, quoting with approval from *Shea v. Olson*, 185 Wash. 143, 53 P.(2d) 615:

> " 'We next consider the provisions of Art. I, §§ 3 and 12 of the state constitution and the fourteenth amendment of the United States constitution, relating to due process and the equal protection of the laws.
>
> "*None of these constitutional provisions apply to laws enacted by a state legislature in the exercise of its police power.* We have repeatedly so held. (Citing authorities.)' " (Emphasis supplied)

The Workmen's Compensation Act was originally sustained as a valid exercise of the state's police power, *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, and that view has persisted down through the case at bar. Presumably the 1941 amendment was a further exercise of the police power. But every such exercise must be reasonable and otherwise legitimate, for as said by the Supreme Court of Maryland,

> "While it is difficult if not impossible to define

precisely the limits of the police power, there must in the very nature of things be some limit to it, for otherwise the guaranties of written constitutions would be little more than mere precatory and directory suggestions without force or affording to the citizen only a false and illusory protection against the invasion of his rights by the State; and his security would not depend upon constitutional guaranties but upon the will of the State in exercising an unlimited police power."

Goldman v. Crowther, 147 Md. 282, 128 Atl. 50, 54.

In *Eubanks v. City of Richmond*, 226 U.S. 137, 142, the Court said, in holding a city ordinance to be an invalid exercise of the police power:

"Whether (a statute) is a valid exercise of the police power is a question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or general prosperity. * * * But necessarily it has its limits and must stop when it encounters the prohibitions of the Constitution."

In *State of Washington ex rel. Seattle Title Trust Company*, 278 U.S. 116, 121, it was said that

"Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of lawful activities." (Citing many cases)

And in *Panhandle Eastern Pipe Line Company v. State Highway Commission of Kansas*, 294 U.S. 613, 619:

> "A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions." (Citing cases)

And in *American Federation of Labor v. Swing*, 312 U.S. 321, 325:

> "* * * That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. * * *"

The exercise by a state of its police power is subservient to the Fourteenth Amendment, and it was held in the *Danzer* case that an exercise of power indistinguishable from the 1941 Act in question was in violation of the due process clause of the Fifth Amendment.

4. The contributions paid by employers into the accident fund are not a license or excise tax.

In further avoidance of the *Danzer* decision, the majority opinion in the case at bar refers to the employer's contributions as a license tax *for the privilege of carrying on business*, saying that this view of the law was initiated in *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, and ap-

proved in *Mountain Timber Company v. State of Washington*, 243 U.S. 219, and the majority opinion cites also *State v. Vinther*, 176 Wash. 391, 29 P.(2d) 693, and *State ex rel. Crabb v. Olinger*, 196 Wash. 308, 82 P.(2d) 865, as further authority.

In the *Davis-Smith Co.* case, the Washington Supreme Court, while primarily sustaining the Act as an exercise of the state's police power, did refer to the employer's contributions as partaking of the nature of a license tax and said that "for many purposes (they) might be so spoken of without harm." It should be remembered, however, that this language of the court was prompted by the attack made in the case upon the constitutionality of the Act, that is, that these contributions constituted a property tax and that, being such, the Act violated the provisions of the state constitution requiring equal and uniform taxation of property for public purposes. It should be remembered also that the Washington Supreme Court has said repeatedly since (see the cases noted below) that the Act is an exercise of the police power, and also that when these remarks were made in the *Davis-Smith Co.* case, the employer's contributions were *not* determinable upon a *cost experience* basis. Laws of Washington, 1911, Chapter 74, Section 4.

It should be noted also that the view of the majority opinion was not approved by this Court in the *Mountain Timber Company* case but rather that the Court, speaking through Mr. Justice Pinckney, very carefully reserved the point, holding that the Act, under all the circumstances, constituted a valid exercise of the state's legislative power.

The remark of the court in *State v. Vinther*, referred to in the majority opinion, is pure dictum, wholly unnecessary to the decision in the case, and it must be observed that *State ex rel. Crabb v. Olinger*, referred to in the majority opinion as authority, had been considered at length and expressly overruled in *St. Paul & Tacoma Lumber Company v. Department of Labor and Industries*, 19 Wn.(2d) 639, 144 P.(2d) 250.

All of this is preparatory to the remark that, except in *State ex rel. Crabb v. Olinger*, since overruled, it has *never been held* by the Washington Supreme Court, in the case at bar or any other case where a decision on the point was necessary to a disposition of the case, that the employer's contributions constitute a license tax. The stray remarks in the cases are due to the court's reference in the *Davis-Smith Co.* case to the contributions partaking of the nature of a license tax. This is probably best indicated by the court's opinion in *State ex rel. Crabb v. Olinger* where Justice Millard's majority opinion referred to the contributions as a license tax. In a dissenting opinion, which later became the view of the majority of the court when the case was overruled, Justice Simpson, one of the dissenting judges, said (196 Wash. 308, 333, 82 P.(2d) 865, 876):

> "The majority holds that the contributions paid under the workmen's compensation act is a license tax, citing *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L.R.A. (N.S.) 466. It is true that reference was made to that question in *Mountain Timber Co. v. Washington*, 243 U.S. 219 * * * citing the *Clausen*

case, *supra*. It will be observed, however, that, in that case, the court did not hold the charge laid upon persons engaged in industries either named in the act or that could be brought under the act, constituted a license tax, but rather that it partakes of the nature of a license tax.

"A tax is defined in 26 R.C.L. 13, to be:

"'* * * an enforced contribution of money or other property, assesed in accordance with some reasonable rule of apportionment by authority of a sovereign state on persons or property within its jurisdiction, for the purpose of defraying the public expenses.'

"The definition of a license tax is contained in 17 R.C.L. 475, as follows:

"'A license tax is one imposed on the privilege of exercising certain callings, professions, or vocations, that, when collected, goes into the public treasury, and, when applied to municipal taxation, is termed "a license fee".'

"The amounts collected by the department pursuant to the provisions of the workmen's compensation act are not taxes, and we have not so held. Such sums are merely sums of money collected by a governmental agency and paid into a trust fund for the sole benefit of those injured workmen falling within the act. The assessments made have none of the characteristics of a license tax. * * *

"The state compels payments by virtue of the exercise of the police power to regulate industry as distinguished from the exercise of the taxing power. The sums paid by the employers are not paid into the treasury for the benefit of the state government as such."

Justice Steinert wrote a concurring dissent:

"* * * they are contributions required of and paid by those engaged in extrahazardous industries to meet the burden resting upon them of carrying the greater part of the cost of accidents occurring in such industries; and, when so paid, these contributions constitute trust funds to be devoted to the purposes specified by the workmen's compensation act. The distinction between these two concepts is very important.

"If these contributions be considered merely as 'license taxes,' then, obviously, the employer is concerned only with the payment of his 'tax' in order to engage in business, and he is in no way concerned with the manner in which such 'taxes' are disposed of or distributed by the department among injured employees. The only questions that the employer could raise, under that theory, would be whether the tax was reasonable. But the workmen's compensation act by its terms discloses beyond any question of doubt that the employer has a very vital interest in the administration of the accident fund, and that he has the right to be heard before the department and in court upon every claim made by a workman. The employer is not a mere licensee under the act; he is in the position of an assured who, for the premiums that he pays, is entitled to have every just claim arising under the act compensated out of the fund and every spurious claim rejected.

"I emphasize this phase of the case because the theory of Judge Millard's opinion is that, since the employer's connection with the workmen's compensation act is *merely by virtue of a taxing process*, he therefore does not have an appeal to

> the courts as a matter of right, but only as a matter of grace; and that, since under the language of the statute the appeal granted to the employer does not operate as a stay, therefore the compensation awarded by the joint board must be paid without regard to the question whether the appeal of the employer may be successful. With that reasoning I cannot agree." (Emphasis ours)

It was said in *Roellich v. Department of Labor and Industries*, 20 Wn.(2d) 674, 148 P.(2d) 957:

> "The respondent has moved to dismiss the appeal of the Weyerhaeuser Timber Company on the ground that an employer has no right of appeal * * *.
>
> "This court has so repeatedly held, that, under similar circumstances, an employer has the right to appeal, that we feel warranted in denying the first motion without citation of authority."

The dissenting opinions in *State ex rel. Crabb v. Olinger* are important, of course, not only because they appear in the overruled case which is cited as authority in the majority opinion in the case at bar, but also because they became the view of the majority of the court when the *Crabb* case was expressly overruled in the *St. Paul & Tacoma Lumber Company* case. It is interesting to note, also, that in the latter case, Justice Millard again wrote the majority opinion, stating in unequivocal terms, as he did in his dissenting opinion in the case at bar, that the employer's contributions do not constitute a license tax, thus recognizing the error in his original view of the *Crabb* case.

The view of the majority of the Washington Supreme Court was brought into line, therefore, with the view of this court expressed, upon similar circumstances, in *Butler v. United States*, 297 U. S. 1:

> "* * * A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation of a matter in which both groups are interested and in respect of which there is a power of legislative regulation. But manifestly no justification for it can be found unless as an integral part of such regulation. The exaction cannot be wrested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end. * * *
>
> "We conclude that the act is one regulating agricultural production; that the tax is a mere incident of such regulation and that the respondents have standing to challenge the legality of the exaction."

It should be observed also that this point showed up again after the case at bar in *Monroe Logging Company v. Department of Labor and Industries*, 21 Wn.(2d) 800, 153 P.(2d) 311, in which only three judges signed the majority opinion, the remaining two, among whom one was with the majority in the case at bar, merely concurring in the result, and, we have no doubt, because of the language in the opinion concerning a "license tax."

It is true that this point was given only passing importance in the majority opinion and, we make bold to say, is only makeweight therein. That it is in error, however, is evident, not only from what has already been said, but also from the purpose, history and operation of the Act itself, particularly as interpreted and applied by the Washington Supreme Court.

In enacting the Act, the legislature stated themselves that they did so under the state's "police and sovereign power," Remington's Revised Statutes of Washington, Section 7673, *not the taxing power.*

The act was originally sustained as a valid exercise of the police power, *State ex rel. Davis-Smith Co. v. Clausen, supra,* 65 Wash. 156, 117 Pac. 1101, and the view that the Act is an exercise of such power has been recognized in many later cases, including the case at bar:

Mountain Timber Co. v. State of Washington, 75 Wash. 581, affirmed, 243 U.S. 219;

State ex rel. Pratt v. Seattle, 73 Wash. 396, 132 Pac. 45;

Ross v. Erickson Construction Co., 89 Wash. 634, 155 Pac. 153;

State v. Postal Tel. Cable Co., 101 Wash. 630, 172 Pac. 902;

Finos v. Netherlands American Mortgage Bank, 147 Wash. 86, 265 Pac. 167;

Lukich v. Department of Labor and Industries, 176 Wash. 221, 29 P.(2d) 388;

State v. Vinther, 176 Wash. 391, 29 P.(2d) 693.

The Act "came of a great compromise between employers and employed" under which the employer, in exchange for limited liability, was willing to pay on some claims in the future where in the past there had been no liability at all, and the employee was willing to give up trial by jury (which has since been restored upon appeals to the Superior Court, Remington's Revised Statutes of Washington, Supplement, Section 7697-2), and to accept a certain award, though far less than he had often won in court. *Stertz v. Industrial Insurance Commission*, 91 Wash. 588, 158 Pac. 256.

The Act, having grown out of a compromise, is for the benefit of the employer as well as the employee, in that the former's liability at common law for negligent injuries to his workman is terminated. Remington's Revised Statutes of Washington, Section 7673; *State v. Postal Tel. Cable Co.*, 101 Wash. 630, 172 Pac. 902.

The Act is not one designed to award full compensation to each individual for all damages suffered, but is only a system *of limited insurance* whereby all industrial employees within the state are paid definite but limited amounts for injuries without regard to the particular individual circumstances or needs of the employee. *Foster v. Industrial Insurance Commission*, 107 Wash. 400, 181 Pac. 912. The Act is *an industrial insurance statute* in which "All the features of an insurance act are present" and which "compels both employers and employed to go into a scheme of insurance." *Stertz v. Industrial Insurance Commission, supra*, 91 Wash. 588, 158 Pac. 256.

The accident fund out of which the cost of accidents is paid (and so also the medical aid fund) is designed to be not more nor less than self-supporting, Remington's Revised Statutes of Washington, Supplement, Section 7676, as is true in any mutual insurance system. The premiums or contributions paid into the fund by employers, in accordance with their respective cost experiences, are trust funds to be devoted exclusively to the purposes contemplated by the Act. Remington's Revised Statutes of Washington, Supplement, Section 7676.

Thus, in holding that the legislature might not appropriate money out of the fund for a purpose foreign to the Act, even though the legislature itself had originally set up the Act, the Supreme Court of Washington said, in *State ex rel. Trenholm v. Yelle*, 174 Wash. 547, 549, 25 P.(2d) 569, 570:

> "The purpose of the workmen's compensation act, as originally enacted, and as amended from time to time by later statutes, has been, and is, to provide compensation for workmen injured in extrahazardous occupations as defined by the act. To that end, the act has created and established two funds known as the 'accident fund' and the 'medical aid fund,' respectively. The industries of the state engaged in extrahazardous work are required to pay into the accident fund certain premiums according to the schedule provided. The workmen so engaged are required to pay a certain percentage of their wages into the medical aid fund for its maintenance. These funds are therefore trust funds drawn from particular sources and devoted to special purposes.

By the act itself, the fund is impressed with a trust."

Although the legislative policy was "to remove all phases of the controversy" at common law between the employer and the employee, that is to say, all questions of liability or freedom therefrom, the Act was nevertheless very carefully drawn to preserve the right of the employer to appear as a party in the administration of each claim of an injured workman, and upon appeal to the courts from the decision of the Department:

Mud Bay Logging Company v. Department of Labor and Industries, 189 Wash. 285, 64 P.(2d) 1054; on rehearing, 193 Wash. 275, 75 P.(2d) 579;

State ex rel. Crabb v. Olinger, 191 Wash. 534, 71 P.(2d) 545;

Hoff v. Department of Labor and Industries, 198 Wash. 257, 88 P.(2d) 419;

Cole v. Department of Labor and Industries, 200 Wash. 296, 93 P.(2d) 413;

St. Paul & Tacoma Lumber Company v. Department of Labor and Industries, 19 Wn.(2d) 639, 144 P.(2d) 250;

Roellich v. Department of Labor and Industries, 20 Wn.(2d) 674, 148 P.(2d) 957.

In the *Mud Bay case*, the Department purported to make a settlement with a workman without giving his employer notice thereof. It was held that the Department's action constituted *a denial of due process of law* to the employer, which had a right to appeal to the courts on account thereof, the Supreme Court

of Washington saying that the order of the Department

> "dealt with and disposed of the primary question raised by Matela's petition to compromise and settle, to-wit: Is the claimant entitled to a permanent partial disability rating? That was a question upon which the logging company had a right to be heard and, as the department well knew from the logging company's participation in the Chehalis hearing, the very question which it desired to litigate.
>
> "* * * The employer has a right to appear before the department to be heard, and is given a statutory right of appeal."

Upon rehearing in the *Mud Bay* case, the court reviewed the Act and then said:

> "Thus, so far as appeals were concerned the employer and employee were virtually placed upon a parity. It is manifest that no distinction is made between employer and employee, except where an employer appeals from an order made (fixing penalties for operating without safeguards) under and by virtue of Rem. Rev. Stat., §7683 (P.C. §3477), in which case the employer must furnish a bond that he will fully comply with the judgment.
>
> "* * * * * * * * *
>
> "* * * There are seven sections providing for appeals by employers, one, §7697, being general in character and the remaining six being specific.
>
> "It is urged that the only right of appeal given to an employer is by virtue of the Laws of 1917, chapter 120, p. 477, §2, Rem. Rev. Stat., §7676. This section, it will be observed, refers to the fixing of rates to be charged the employer, the

rates being based to a large extent on the number and kinds of accidents that occur to the workmen of such employers.

"Should it be held that the employer has no right of appeal except by the provisions of the above section, he would find himself charged with certain accidents which would add to his cost experience without being given an opportunity to contest the same. Certainly, the employer could not dispute the rates under the Laws of 1917, chapter 120, p. 474, on the ground that the original charge to his cost experience on account of his workmen having been injured was improper. Under such circumstances, the department would be in a position to answer that the claims had been allowed after a proper hearing and the amounts so allowed paid to the workmen."

The court then commented upon certain of its cases:

Ek v. Department of Labor and Industries, 181 Wash. 91, 41 P.(2d) 1097;

Luton v. Department of Labor and Industries, 183 Wash. 105, 48 P.(2d) 199, and

Albrecht v. Department of Labor and Industries, 192 Wash. 520, 74 P.(2d) 22,

to which may be added:

Abraham v. Department of Labor and Industries, 178 Wash. 160, 34 P.(2d) 457;

Prince v. Saginaw Logging Company, 197 Wash. 4, 84 P.(2d) 397;

Carlson v. Department of Labor and Industries, 200 Wash. 533, 94 P.(2d) 191; and finally

LeBire v. Department of Labor and Industries, 14 Wn.(2d) 407, 128 P.(2d) 308,

from which it then, and now appears without question that an order of the Department or Superior Court, from which no appeal is taken, is *res judicata* of all issues before the tribunal rendering the decision against the employer as well as the workmen. The court continued, upon the Mud Bay rehearing:

> "If an employer was not given the right of appeal from a decision of the appellant's joint board, such decision would then, upon a hearing for the purpose of fixing rates, be held *res adjudicata* as to such claims, and the employer would be bound to have them charged against his cost experience. Such was not the intention of the legislature."

The processing of a claim by the Department and the courts, therefore, is a statutory action in which the employer is an affected and interested party. The employer's appeal not only protects him against the operation of the doctrine of *res judicata*, and protects his cost experience against unlawful or excessive awards, but also operates as a stay of an award to a claimant pending disposition of the appeal, *St. Paul & Tacoma Lumber Company v. Department of Labor and Industries, supra*, 19 Wn.(2d) 639, 144 P.(2d) 250; and a successful appeal by an employer from a judgment of the Superior Court in favor of a claimant defeats the award to the claimant even though the Department does not appeal from the Superior Court judgment. *Cole v. Department of Labor and Industries*, 200 Wash. 296, 93 P.(2d) 413.

The Industrial Insurance Law speaks of the employer's contributions throughout as "contributions,"

"premiums" and "assessments," never as a "tax." Nowhere in the act is language used even suggesting that the contributions are the price of carrying on business, doubtless, we think, because the Act has always been thought of as an insurance statute, not a revenue measure. On the other hand, by the State's Revenue Act of 1935, as amended (Remington's Revised Statutes of Washington, Supplement, Section 8370-1 *et seq.*, and particularly Section 8370-36 thereof and Section 8370-4, 1943 Permanent Supplement), the legislature has expressly levied taxes, for revenue, upon a great variety of businesses, "for the act or privilege of engaging in business activities."

The Act contains a provision expressly allowing an employer whose occupation is "non-extrahazardous" to make application to the director of labor and industries "to fix rates of contribution for such occupation for industrial insurance and medical aid," and thereby to elect to obtain coverage for himself and his employees. Remington's Revised Statutes of Washington, Section 7696. Each employee has five days, and each employee subsequently hired has five days after the date of his employment to decline to become subject to the act, Id., Section 7696, and an employer may revoke his election for coverage at any time, *State of Washington v. Bank of California, N.A.*, 187 Wash. 153, 59 P.(2d) 1128. Is it to be said that employers and employees can turn the tax laws on and off at will?

The industrial insurance system of the State of Washington is in substance different from the system

in force in 45 other states[1], where the employers carry their insurance with private carriers, only in that the State of Washington, as trustee and stakeholder but no more, holds the funds out of which employees are compensated. A proceeding upon the filing of each claim is conducted by the appellee Department in which the claimant and the employer are the financially interested parties, rather than the employee and an insurance carrier. The Department's order is subject to review by the courts as in other states. The contributions of employers do not differ in their essential nature (except for the lack of profit element) from premiums paid by employers to insurance carriers as in the other states.

Of course, the accident fund is not a private fund in the sense that it may be withdrawn or diverted by the contributors, but it is a trust fund which employers must replenish through future premiums, as depleted from time to time by awards to their workmen, and the Department, as stakeholder, has no financial interest in the fund. The director of the Department is empowered to fix the basic premium rates from time to time, as he may determine the condition of the fund requires, and in such manner as to insure that the fund shall not be more nor less than "self-supporting."

The contributions paid by employers, for the benefit of workmen and not to meet general public expenses, are insurance premiums as denominated by

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[1]Ohio has an act quite similar to Washington's and there is no act in effect in Mississippi.

the Act itself. The employer is not interested, as he would be if the contributions were a tax, merely in whether his basic premium rate fixed, at the director's pleasure, is reasonable. Rather, he is vitally interested in the propriety and amount of each award made to his workmen, and the resulting charge to his cost experience, and the means of protecting that interest *in each case* is elaborately secured to him by the Act.

5. The majority opinion below considered further

The majority opinion in the case at bar recognizes that the employer has an appealable interest in each case, so that he may protect his cost experience and future premium rate. The opinion says also that when it is finally decided the claimant is entitled to compensation (and, we presume, when the amount thereof is fixed), the employer's interest ceases and all procedural and administrative questions thereafter lie only between the claimant and the Department. For argument's sake we may agree with this until expenses begin again or may begin, but it is then the position of the majority, in avoiding the *Danzer* decision and to bring the case within *Campbell v. Holt*, that the question whether the legislature can retroactively reopen the right of a claimant to compensation is a mere remedial or administrative matter between him and the Department with which the employer is not concerned.

But this is diametrically opposed to the court's premise that the employer is vitally concerned until it is decided that the claimant is entitled to compensa-

tion. The question of whether the appellee Rowley is entitled to a reopening of his claim and an additional award under the 1941 Act, where he had no right to more compensation before, does not involve a mere administrative matter within the Department. The question is whether the appellant's *future* premiums are to be increased to pay the *new* award authorized by the legislature on account of facts occurring long in the past, and with respect to which no right of any kind existed prior to the 1941 Act which attempted to revive a claim long expired, This is a serious substantive matter looking to the issue of whether Rowley is entitled to compensation, as the majority opinion says. The question is whether an act of the legislature can *create* a new statutory right retroactively in Rowley, to the appellant's damage, to replace the *right* previously *expired*, and it was held in the *Danzer* case that such a legislative act is unconstitutional.

It is suggested in the majority opinion that *Campbell v. Holt* applies because the Industrial Insurance Law as originally passed in 1911 did not contain a time limitation, it being inserted in the Act for the first time in 1927.

But in *Davis v. Mills*, 194 U. S. 451, it was made plain that this is not so. That case involved an action to recover upon a liability of corporate directors for violation of a duty imposed by statute. It was held that such statutory right of action was conditioned by a limitation provision, covering actions against corporate directors "to enforce a liability created by law," even though (as here) such provision

was enacted "at a different time" and was located (as is not true here) in a title different from the statute creating the liability. This court (through Mr. Justice Holmes) first noted that "ordinary" limitation statutes are treated as laws of procedure affecting the remedy only and not the right. The opinion continued (p. 454):

> "But in cases where it has been possible to escape from that qualification by a reasonable distinction, courts have been willing to treat limitations of time as standing like other limitations, and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced, *whether using words of condition or not. The Harrisburg*, 119 U.S. 199. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right." (Italics ours).

The limitation provision was inserted ten years before Rowley's injury, in the *very section* of the statute upon which his *right* was *based*, and immediately following the clause in that section which created the right. It is not the usual general statute of limitation, as in *Campbell v. Holt*, applying to all manner of common law causes of action, but is precisely the sort of

limitation which this court has repeatedly found to limit and condition the right created by the statute itself and, in truth, is exactly the sort of limitation which the Supreme Court of Washington, in every case which has heretofore come before that court, has found to condition the right.

Notwithstanding the majority opinion below, it must be said without equivocation either that the appellee Rowley's statutory rights in the absence of action on his part under the Act finally terminated upon the lapse of three years from the closing of his claim, without right of *revival* thereafter, or that the decisions of this court noted above, and those of the Supreme Court of Washington, are wrong. There is no reasonable distinction between those cases and the case at bar.

The majority opinion below refers to *Mattson v. Department of Labor and Industries*, 176 Wash. 345, 29 P. (2d) 675, 293 U.S. 151. In that case, this court held the time limitation, first inserted in 1927, was valid as against a workman who suffered an injury prior to the effective date of the amendment. The amendment preserved his right to apply for a reopening within three years after the limitation became effective and that was enough to make it constitutional. The *Mattson* case is nothing more than an application of the familiar rule that an amendment shortening the period of limitation is valid so long as it leaves a litigant a reasonable period of time within which to assert his right. It was held also by the Supreme Court of Washington in the *Mattson* case

that the Workmen's Compensation Act does not constitute a private contract between the employer and a workman, and hence that the 1927 amendment did not impair a contract in violation of the Constitution. No such contention is made here.

The *Mattson* case is relied upon by the majority, however, for the proposition that no "vested right" of the appellant is involved in this case. Use of this term merely tends to confuse the issue, which is simply whether the legislature, out of circumstances occurring long in the past, can retroactively recreate a right in Rowley and a liability upon the appellant to replace a right and liability which had long since expired.

The majority opinion below purports to interpret the Industrial Insurance Law as levying a tax on the privilege of doing business and otherwise to indicate that the employer has no substantial interest in the matter here in controversy. The whole history of the Act, its purposes, and its application in a whole host of circumstances, as discussed in the Washington Supreme Court's opinions, indicate that the majority's interpretation is purely formalistic. Of course a decision of a state court of last resort is conclusive on a mere question of construction, but this court is not bound by the characterization given to a state law by the state courts or legislature where the federal constitution is concerned and this court will regard the substantive nature and result of the litigation and its effect upon the federal right asserted.

Storaasli v. State of Minnesota, 283 U.S. 57;

Foster Fountain Packing Co. v. Haydel, et al., 278 U.S. 1;

Quaker City Cab Co. v. Commonwealth of Pennsylvania, 277 U.S. 389;

Hanover Fire Insurance Co. v. Carr, 272 U. S. 179;

Truax v. Corrigan, 257 U.S. 312;

Crew Lavick Co. v. Commonwealth of Pennsylvania, 245 U.S. 292.

Although the department is the stakeholder, the Washington Industrial Insurance system is substantially the same as the system in all the other states but two, where, under laws enacted in the exercise of the police power, the rights and obligations of employees and employers are settled in administrative procedure and by review in the courts. In truth and in substance the responsibility of the appellant in this case to respond for a new award to the appellee Rowley was once terminated and the 1941 Act purports to create a new right out of old circumstances to the appellant's damage. In truth and in substance, this case is exactly the same as the *Danzer* case, and either that case or the majority decision below is wrong. The *Danzer* decision is founded upon a long line of respected decisions of this court and has never been, so far as we have been able to determine, questioned by any other court. It should be approved and confirmed by this court, and the judgment of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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APPENDIX OF STATUTES

[NOTE: The section numbers noted below refer to Remington's Revised Statutes of Washington. Except where express reference is made to the Supplements, the section will be found in the original work. Italics in all instances, except in headings, are ours.]

Section 7673. Declaration of police power. The common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein *its police and sovereign power*, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end *all civil actions and civil causes of action* for such personal injuries *and all jurisdiction of the courts* of the state *over such causes are hereby abolished*, except as in this act provided.

Section 7674. (Supplement). Extra-hazardous employments—Enumeration and exceptions—Power of director to declare additional extra hazards—Hearing and review. There is a hazard in all employment, but certain employments have come to be, and to be recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within the legislative jurisdiction of the state, in the following enumeration, and they are intended to be embraced within the term "extra-hazardous" wherever used in this act, to-wit:

(Set out here is a long list of industries or occupations, followed by a provision permitting the director of labor and industries, upon notice and hearing, to include other industries as extra-hazardous.)

Section 7676. (Supplement). Contribution rates for accident fund—Revision of rates by director—Assessments for deficits—Basic rates for years—Premium rates for years and mode of computing—Schedule of basic rates by classes—Payroll adjustments, notice of commencement of work, and payment of premium * * *. Inasmuch as industry should bear the greater portion of the burden of the cost of its accidents, each employer shall prior to the fifteenth day of every month, pay into the state treasury *(1) for the accident fund and (2) for the medical aid fund,* a certain number of cents for each man hour worked by the workmen in his employ, engaged in extra-hazardous employment; if, however, there should be a deficit in any class or sub-class the Director of Labor and Industires, through the Supervisor of Industrial Insurance, is hereby authorized and directed to assess the same against all the contributors to such class or sub-class during the calendar year or fraction thereof in

which said deficit was incurred or created. The Director of the Department of Labor and Industries shall have the power to promulgate, change and revise such rates according to the condition of the accident and medical aid funds, and to establish rates for industries declared to be extra-hazardous subsequent to the taking effect of this amendment and/or which voluntarily seek coverage under the elective adoption provisions of this act.

The amounts to be paid into the accident fund shall be determined as follows: The Department of Labor and Industries shall, prior to the first day of January of each year determine for each class and/or sub-class, *a basic premium rate* for the ensuing calendar year, and in so doing, shall take into consideration, first, the cost experience of each class and sub-class over the two-year period immediately preceding September first of the year in which the basic rate is being fixed; second, the then condition of each class and/or sub-class account.

The Department of Labor and Industries shall also, prior to the first day of January of each year determine the *premium* rate to be paid into said accident fund during the ensuing year by each employer to be credited to each class and/or sub-class account, applicable to the employer's operations or business, and in so doing, shall take into consideration, *the average cost experience of each employer* for each workman hour reported by him during each fiscal year in each such class or sub-class over the five-year period immediately preceding September first of the year in which the rate is being determined, and in so computing, the cost experience of any employer, the fixed sum of four thousand five hundred dollars ($4,500) shall be charged against his experience for each injury resulting in death or total permanent disability

of a workman instead of the actual cost to the accident fund of such injury. The actual *premium rate* which any employer shall be required to pay for the accident fund shall be forty per cent (40%) of the basic rate, plus sixty per cent (60%) of the employer's cost rate for each workman hour reported by him during each fiscal year over the five-year period next preceding the then last September first, but in no case shall the total rate exceed one hundred sixty per cent (160%) of the basic rate.

The *basic premium rates* for the accident fund and the medical aid fund, effective immediately upon the passage of this act until so modified by the Director of the Department of Labor and Industries, shall be in accordance with the following classifications, subclassifications and schedules:

(The letters "N.O.S." as used in this section shall mean "Not Otherwise Specified.")

(The letter "(S)" as used in this section shall mean suspension of collection of premiums in that fund for employers entitled to an individual rating.)

Ind. Ins. means *Industrial Insurance.*

Med. Aid means Medical Aid.

Occ. Dis. means Occupation Disease.

Wkmn. Hr. means Workman Hour.

* * * * * * * *

	Industrial Insurance Cents Per Workman Hour	Melical Aid Cents Per Workman Hour	Occupational Disease Cents Per Workman Hour
Class 1.			
1-1 Ditches and canals (N.O.S.)	3.2	.4	.1
Canals and other irrigation	3.2	.4	.1

[Here follow the rates for the remaining 89 subclasses.]

Every employer who shall enter into any business, or who shall resume operations in any work or plant after the final adjustment of his payroll in connection therewith, shall, before so commencing or resuming operations, as the case may be, notify the Director of Labor and Industries of such fact, accompanying such notification with an estimate of his payroll and workmen hours for the first calendar month of his proposed operations, and shall be liable for a *premium* of at least such estimate. Every such employer shall pay the full basic rate until such time as an experience rating in excess of a one, two, three or four year period may be computed as of a first succeeding September first date, and shall be liable for a *premium* of at least one dollar ($1.00) per month irrespective of the amount of his workmen hours reported during said month to the Department.

To the end that no employer shall evade the burden imposed by an unfavorable or high cost experience, the Director of Labor and Industries shall have the power to determine whether or not an increase, decrease or change (a) of operating property; (b) of interest in operating property; (c) of employer; (d) of personnel or interest in employer is sufficient to show a bona fide change which would make inoperative any high cost experience.

Every employer within the provisions of this act shall on or before the fifteenth day of each month hereafter furnish the Department with a true and accurate payroll and the aggregate number of workmen hours, during which workmen were employed by him during the preceding calendar month, the total amount paid to such workmen during such preceding calendar month, and a segregation of employment in the different classes provided in this act, and shall pay his *premium* thereon to the accident fund and

medical aid fund. The sufficiency of such statement shall be subject to the approval of the Director of Labor and Industries.

Every employer shall keep at his place of business a record of his employment from which the above information may be obtained and such record shall at all times be open to the inspection of the Director of Labor and Industries, Supervisor of Industrial Insurance, or the traveling auditors, agents or assistants of the Department, as provided in section 7690 of Remington's Revised Statutes of Washington.

In all cases where partners or other persons are excluded on the payroll such treatment shall state both the names and occupations of the parties excluded and no such person shall be entitled to compensation unless notice in writing that such excluded person has been included is received by the Department prior to the date of injury to such person. Such employer shall at the time of reporting his payroll and workmen hours also state the names and addresses of any contractor or sub-contractor operating for or under him.

Every person, firm, or corporation who shall fail to keep such record or fail to make such report in the manner and at the time herein provided shall be subject to a penalty of not to exceed one hundred dollars ($100) for each such offense, to be collected by civil action in the name of the state and paid into the accident fund.

Every employer who shall fail to furnish an estimate of payroll and workmen hours and make payments as above provided shall be liable to a penalty of not to exceed five hundred dollars ($500) and shall also be liable if an accident has been sustained by an employee prior to the time such estimate is received by the Department, to a penalty in a sum equal to

fifty per cent (50%) of the cost to the accident fund and medical aid fund of such accident, to be collected in a civil action in the name of the state, and paid into the accident fund and/or medical aid fund. The Director of Labor and Industries may waive the whole or any part of any penalty charged under this act. In respect to any injury happening to any of his workmen during the period such employer shall be in default in the payment of any *premium*, if such default be after demand for payment, or if such employer shall be in default for failure to furnish the Department with an estimated payroll and workmen hours or with monthly reports of his payroll and workmen hours as required by this section, the defaulting employer shall not be entitled to the benefits of this act, but shall be liable to suit by the injured workman (or his beneficiaries and dependents), at his or their option, as he would have been on March 14, 1911, and in any action brought against such employer, it shall be no defense for such employer to show that such injury was caused in whole or in part by the negligence of a fellow servant of the injured workman, that negligence of the injured workman, other than his willful act committed for the purpose of sustaining the injury contributed to the accident or that the injured workman had knowledge of the danger or assumed the risk which resulted in his injury. If such injured workman or his beneficiaries, or dependents, shall elect to take under this act, such action against the employer shall revert to the state for the benefit of the accident fund and/or the medical aid fund.

Any employer, who shall misrepresent to the Department the amount of his payroll or the number of workmen hours upon which the *premium* under this act is based, shall be liable to the state in ten times the amount of the difference in *premiums* paid and the amount the employer should have paid, and shall also

be guilty of a misdemeanor if such misrepresentations shall be made knowingly. Civil penalties to the state under this act shall be collected by civil action in the name of the state and *paid into the accident fund.*

For the purpose of such payments into the accident fund, accounts shall be kept with each industry in accordance with the classification herein provided and no class shall be liable for the depletion of the accident fund from accidents happening in any other class. Each class shall meet and be liable for the accidents occurring in such class. The fund thereby created shall be termed the "accident fund" *which shall be devoted to the purpose specified for it in this act.*

The medical aid fund created in section 7713 of Remington's Revised Statutes of Washington shall not be kept by classes and all payments shall be made from the one fund, but accounts shall be kept with each class and sub-class of industry in accordance with the classification herein provided for the purpose of computing the medical aid cost experience of such classes and sub-classes and determining the correctness of the medical aid rates charged such classes and sub-classes.

It is the intent that the accident fund created under this section shall ultimately become neither more nor less than *self-supporting*, exclusive of the expense of administration, and if in the adjustment of *premium rates* by the Director of Labor and Industries the moneys paid into the fund by any class or classes shall be insufficient to properly and safely distribute the burden of accidents occurring therein the Department may divide, rearrange or consolidate such class or classes, making such adjustment or transfer of funds as it may deem proper.

It shall be unlawful for the employer to deduct or obtain any part of the *premium* required by this sec-

tion to be by him paid into the accident fund from the wages or earnings of his workmen or any of them, and the making or attempting to make any such deduction shall be a gross misdemeanor. The Director of Labor and Industries shall make corrections of classifications or sub-classifications or changes in rates, classes, and sub-classes when the best interests of such classes or sub-classes will be served thereby. From the original classification or *premium* rating or any change made therein, any employer claiming to be aggrieved may appeal to the joint board and to the courts in the manner provided in section 7697 of Remington's Revised Statutes.

If a single establishment or work comprises several occupations in this section in different risk classes, the *premium* shall be computed according to the workmen hours of each occupation, or in the discretion of the Director of Labor and Industries, a single rate of *premium* may be charged for the entire establishment based upon the rate of *premium* of the occupation reporting the largest number of workmen hours; Provided, That, when a single establishment or work comprises distinct different risk classes, each employing a considerable number of persons, the right to have the *premium* computed according to the number of workmen hours of each occupation shall not be denied the employer without hearing: Provided further, That any employer desiring to report his operations in the various distinct risk classifications, subsequent to the passage of this act, must, before so reporting, notify the Director of Labor and Industries in writing of such fact, prior to the first day of the month in which such employer desires to segregate his operations, and inform the Director of the segregated classifications he desires. After an employer has segregated his operations into the various distinct risk classifications, unless the employer and Director

agree to the contrary, the employer must continue to report in those segregated classifications as long as exist in his operation and involve a considerable number of employees.

The Director of Labor and Industries shall have power to authorize any employee of the Department who is an attorney admitted to practice law in the State of Washington to appear for the department in any action instituted for the purpose of collecting *industrial insurance premiums.*

That the *premiums* of employers operating coal mines which shall include shaft sinking and all tunneling in connection with coal mines and the building industry, which shall include, all field activities in connection with the erection, alteration, repairing or demolishing of any building or buildings, or part thereof or appurtenance thereto, adapted to residential, business, governmental, education or manufacturing uses, shall be computed on a base rate only and no merit rating credits or penalties shall be given or imposed on such employers.

Section 7679. [The original section was in force at the time of the appellee Rowley's injury. The section, as amended in 1941, is set out in the 1941 Permanent Supplement, and subsection (h) of the section as so amended is the challenged statute. The original section and the section as amended in 1941, insofar as reproduced here, are the same except for the substitution of the word "five" for the word "three," as indicated by italics, in subsection (h).] *Schedule of awards.* Each workman who shall be injured in the course of his employment, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with the following schedule, and, except as in this Act otherwise provided, such payment shall be in lieu of any

and all rights of action whatsoever against any person whomsoever.

COMPENSATION SCHEDULE

[Here follows an enumeration of awards:

(1) Burial expenses in cases of deceased workmen;

(2) Monthly payments to the surviving widow for life, or children until the age of 18 is reached, of a deceased injured workman;

(3) Monthly payments for life to injured workmen who are totally and permanently disabled;

(4) Monthly payments to workmen totally but temporarily disabled, until they are able to return to gainful occupations;

(5) Lump sum awards to workmen suffering certain specified permanent disabilities, as well as "unspecified" disabilities not involving amputation or other loss of a part of the body.]

(g) Should a further accident occur to a workman who has been previously the recipient of a lump sum payment under this act, his future compensation shall be adjudged according to the other provisions of this section and with regard to the combined effect of his injuries and his past receipt of money under this act.

Should a workman receive an injury to a member or part of his body already from whatever cause permanently partially disabled, resulting in the amputation thereof or in an aggravation or increase in such permanent partial disability but not resulting in the permanent total disability of such workman, his compensation for such permanent partial disability shall be adjudged with regard to the previous disability of the injured member or part and the degree or extent of the aggravation or increase of disability thereof.

(h) If aggavation, dimunition, or termination of

disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the Director of Labor and Industries, through and by means of the Division of Industrial Insurance, may, upon the application of the beneficiary, made within *five* years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: Provided, Any such applicant whose compensation has heretofore been established or terminated shall have *five (5)* years from the taking effect of this act within which to apply for such readjustment.

[Here follow further subsections of no particular importance here.]

Section 7696. *Employer's elective adoption of act—Workman's election.* Any employer engaged in any occupation other than those enumerated or declared to be under this act as provided in section 7674, may make written application to the director of labor and industries to fix *rates of contribution* for such occupation *for industrial insurance* and for medical aid, and thereupon it shall be the duty of the director of labor and industries through the division of industrial insurance to fix such rate, *which shall be based on the hazard of such occupation* in relation to the hazards of the occupations for which rates are prescribed. When such rate shall be so fixed such applicant may file notice in writing with the supervisor of industrial insurance, giving ten days' notice of his or its election to contribute under this act, and shall forthwith display in a conspicuous manner about his or its works and in sufficient number of places to reasonably inform his or its workmen of the fact, printed

notices furnished by the department stating that he or it has elected to contribute to the accident fund and the medical aid fund and stating when said election will become effective. Any workman in the employ of such applicant shall be entitled at any time within five days after the posing of said notice by his employer, or within five days after he has been employed by an employer who has elected to become subject to this act as herein provided, to give a written notice to such employer and to the department of his election not to become subject to this act. At the expiration of the time fixed by the notice of such employer, the employer and such of his or its workmen as shall not have given such written notice of their election to the contrary shall be subject to all provisions of section 7673 and 7796, and entitled to all of the benefits thereof: Provided, however, That those who have heretofore complied with the foregoing conditions and are at the time of the passage of this amendment carried and considered by the department as within the purview of this act shall be deemed and considered as having fully complied with its terms and shall be continued by the department as entitled to all of the benefits and all of the liabilities without other or further action.

Section 7697. (1943 Permanent Supplement) *Court review—Application for rehearing by joint board and proceedings thereon.* Whenever the Department of Labor and Industries has made any order, decision or award, it shall promptly serve *the claimant, employer or other person affected thereby,* with a copy thereof by mail, which shall be addressed to such claimant, employer or person at his last known address as shown by the records of the department. Any claimant, employer or other person *aggrieved by any such order, decision or award*

must, before he appeals to the courts, serve upon the Director of Labor and Industries by mail or personally, within sixty days from the day on which such copy of such order, decision or award was communicated to the applicant, an application for rehearing before the Joint Board of said department, consisting of the Director of Labor and Industries, the Supervisor of Industrial Insurance and the Supervisor of Safety. Such application shall set forth in full detail the grounds upon which the applicant considers such order, decision or award is unjust or unlawful, and shall include every issue to be considered by the Joint Board, and it must contain a detailed statement of facts upon which such claimant, employer or other person relies in support thereof. The claimant, employer or other person shall be deemed to have waived all objections or irregularities concerning the matter on which such rehearing is sought other than those specifically set forth in such application for rehearing or appearing in the records of the Department. If the Joint Board, in its opinion, considers that the Department has previously considered fully all matters raised by such application it may, without further hearing deny the same and confirm the previous decision or award, or if the evidence on file with the Joint Board sustains the applicant's contention, it may, without further hearing, allow the relief asked in such application, otherwise, it shall order a rehearing to decide the issues raised. If a rehearing be granted it shall be heard in the county of the residence of the applicant, or in the county where the injury occurred, at a place designated by the Joint Board, but the hearing thereof may be adjourned from time to time from place to place within said county, as the convenience of witnesses may require. Such rehearing shall be de novo and summary, but not witness' testimony shall be received unless he

shall first have been sworn to testify the truth, the whole truth and nothing but the truth in the matter being heard, or unless his testimony shall have been taken by deposition according to the statutes relating to Superior Courts of this state. The Joint Board shall cause all oral testimony to be stenographically reported and thereafter transcribed, and when transcribed the same, with all depositions, shall be filed in, and remain a part of the record on the rehearing. Such rehearing may be conducted by one or more members of the Joint Board, or by some person or persons in the regular employ of the Department, duly commissioned by said Board to conduct such hearing, but the record on rehearing shall be considered by all of the members of said Joint Board, and the decision of a majority of said Joint Board shall be the decision of the Joint Board, and upon such decision being rendered all parties to said rehearing shall be given written notice thereof by the Joint Board.

An application for rehearing shall be deemed to have been denied by the Joint Board unless it shall have been acted upon within thirty days from the date of service: Provided, however, That the Joint Board may in its discretion, extend the time within which it may act upon such application, not, exceeding thirty days.

[Here follow provisions concerning the conduct of hearing, punishment for contempt, etc.]

Within thirty days after the final order of the Joint Board upon such application for rehearing has been communicated to such applicant, or within thirty days after rehearing is deemed denied as herein provided, such applicant may appeal to the Superior Court of the county of his residence, or to the Superior Court of the county where the injury occurred, but

upon such appeal may raise only such issues of law or fact as were properly included in his application for rehearing; or in the complete record in the Department. On such appeal the hearing shall be *de novo*, but the appellant shall not be permitted to offer, and the court shall not receive, in support of such appeal, evidence or testimony other than, or in addition to, that offered before the Joint Board or included in the record filed by the Department: Provided, That the right of cross-examination shall not be limited by the testimony before the Joint Board. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. Such appeal shall be perfected by filing with the Clerk of the Court a notice of appeal and by serving a copy thereof by mail, or personally, on the Director of Labor and ndustries. The Department of Labor and Industries shall, within twenty days after receipt of such notice of appeal, serve and file its notice of appearance and such appeal shall thereupon be deemed at issue. No bond shall be required on such appeal or on appeals to the Supreme Court, except that an appeal by the employer from a decision of the Department under section 7683 of Remington's Compiled Statutes shall be ineffectual unless, within five days following the service of notice thereof, a bond, with surety satisfactory to the court, shall be filed, conditioned to perform the judgment of the court. Except in the case last named an appeal shall not be a stay. The calling of a jury shall rest in the discretion of the court, except that in cases arising under section 7683 and 7690 of Remington's Compiled Statutes, either party shall be entitled to a jury trial upon demand.

The Department of Labor and Industries shall serve upon the appellant and file with the Clerk of the Court

before trial, a certified copy of its complete record on the claim, which shall, upon being so filed, become a part of the record in such case.

If the court shall determine that the Department has acted within its power and has correctly construed the law and found the facts, the decision of the Department shall be confirmed; otherwise, it shall be reversed or modified. In case of a modification or reversal the Superior Court shall refer the same to the Department of Labor and Industries with an order directing it to proceed in accordance with the findings of the court: Provided, That any award shall be in accordance with the schedule of compensation set forth in this act.

It shall be unlawful for any attorney engaged in any such appeal to charge or receive any fee therein in excess of a reasonable fee, to be fixed by the court in the case, and if the decision of the Joint Board shall be reversed or modified, such fee and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund, if the accident fund is affected by the litigation. In other respects the practice in civil cases shall apply. Appeal shall lie from the judgment of the Superior Court as in other civil cases. The Attorney General shall be the legal adviser of the Joint Board and shall represent it in all proceedings. In all court proceedings under or pursuant to this act the decision of the Department shall be prima facie correct and the burden of proof shall be upon the party attacking the same.

Section 7697-2 (Supplement). *Jury trial on appeal —De novo trial—Effect.* In all appeals to the Superior Court from any order, decision or award of the joint board of the Department of Labor and Industries, either party shall be entitled to a trial by

jury upon demand. The jury's verdict in every such appeal shall have the same force and effect as in actions at law. In any such appeal the trial shall be *de novo* and no party to the appeal shall be permitted to introduce evidence in court in addition to that contained in the departmental record.